CONCLUSIVENESS OF ADMINISTRATIVE DETERMINATIONS IN THE FEDERAL GOVERNMENT

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The Federal Constitution provides that no person shall be deprived of life, liberty or property without due process of law, and vests in the Federal Supreme Court the ultimate power to determine what is due process. The legality of any interference with person or property may always be questioned in judicial proceedings, and therefore depends, in the last analysis, upon its conformity to a rule of law laid down by the courts.

The most usual method of disturbing the individual in the enjoyment of his personal and property rights is by judicial proceedings, and no person without authority of some branch of the government can constitutionally imprison him or permanently appropriate his property by any other means. Conceivably, the doctrine might have obtained that the government and its agents acting in official capacities must also have recourse to the courts in any undertaking affecting private rights. But "due process" has been interpreted as meaning process in conformity with certain fundamental principles, rather than any specific and required mode of procedure. The courts have held that, in certain instances, the government may interfere with private rights through the action of its administrative agents, and that such agents may be vested with the power of final and conclusive determination of the facts on which their action is based.

There are, of course, two limitations upon this administrative power, one legislative, the other judicial, or, more correctly, constitutional. The Constitution itself vests in the executive branch of the government, power to act in several matters which necessarily have an indirect effect upon private rights, (Luther v. Borden, 7 Howard 1), but the authority to determine finally questions directly affecting such rights must depend upon express legislative enactment.

Further, it remains for the judiciary to determine whether such enactment conforms to the requirement of the Constitution.

No thoroughly satisfying and all inclusive definition of due process has ever been evolved. We can best understand the real value of the constitutional provision by ascertaining what deeds may be done in its name.

An examination of the cases will show the theories upon which this administrative power is based, the distinction between determinations of fact and the decision of matters of law or application of rules of law to determined facts, the control which the courts retain over administrative procedure, and the limitations on the legislature in respect to the objects for which the power may be conferred.

I DETERMINATIONS AFFECTING PROPERTY

The leading case for the doctrine that "due process of law" does not of necessity require judicial proceedings is Murray's Lessee v. the Hoboken Land and Improvement Co., 18 Howard 272 (1856). It was there decided that congress might clothe the administration with power to determine the amount due from a government officer, and to enforce its collection by means of a distress war-

rant, issued by the solicitor of the treasury, without resort to judicial process. The decision was reached the more easily because such summary methods had long been employed and the legislative construction of the Constitution was therefore entitled to weight, and because the matter was one of the internal law of administration, where discretionary and arbitrary power in superior officers is essential to administrative discipline and effectiveness. "Due process" was defined as having the same meaning as "the law of the land," It was asserted that the law of the land had long authorized more summary procedure for the collection of public than for the collection of private debts, and the distinction between the two was declared to be founded on "imperative necessity."

The same principle was applied where the administration was given power to act summarily in collecting a tax from a citizen, not a member of the administration, by a warrant issued by the collector. Springer v. U. S., 102 U. S. 586 (1880). Precedent and governmental necessity were both invoked in support of the decision. The court said: "The power to distrain personal property for the payment of taxes is almost as old as the common law;" and, further on: "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason. If the laws here in question involve any wrong or unnecessary harshness, it was for congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

It is not to be inferred, however, that the administration is subject to no judicial restraints. The govern-

ment secured title through administrative action, but to obtain possession, it was compelled to resort to judicial proceedings, in which such questions as the legality of the tax, the authority of the officer and the ownership of the land could be raised and passed on adversely to the administration.

In other instances, the finality of administrative determinations of fact has been sustained upon the principle that, when a matter is confided to a special tribunal, its decision within its authority is conclusive on all others. Johnson v. Towsley, 13 Wall 72 (1871). In this case, the expression was *obiter*, because the court reviewed matters of law upon which the administration was held to have erred, but the opinion is of value as an indication that the court based the administrative power on the general rule of law stated, and not upon an interpretation of the statute. In Smelting Co., v. Kemp, 104 U. S. 636 (1881), the principle was fairly laid down. To impeach the validity of a land patent, the defendant offered in evidence the record of the proceedings in the land department, as tending to show that, owing to the quantity of land in the claim and the method of locating it in order to obtain the patent, the land office had no authority in law to proceed as it did. The evidence was, however, held inadmissible, on the ground that the decision of the land department of facts within its jurisdiction was final and not to be reviewed by the courts. The patent was said to be in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law was intrusted, that all the requirements preliminary to its issue had been complied with.

The extent of the doctrine was stated by Mr. Justice

Field, as follows: "A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed."

This case suggests and the preceding one decides that this power of final determination is confined strictly to the decision of those facts within the jurisdiction vested by the statute in the special tribunal. Though, by an erroneous finding of fact, the department may grant a patent under circumstances not contemplated by the statute, its action when based on a misinterpretation of law or the decision of facts not committed to its determination, may be set aside in judicial proceedings. To quote again from Smelting Co. v. Kemp: "On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called in question; but its authority to act at all is denied, and shown never to have existed."

In these cases in the land department, however, owing to the fact that two conflicting claims may both be based

upon administrative determinations and because of the jurisdiction of equity in several matters dealing with real estate, there must always be a wider range of judicial review than in the other administrative determinations which we have to consider. As Mr. Justice Miller queries in Johnson v. Towsley, cited *supra*: "What conclusiveness or inflexible finality can be attached to a tribunal whose acts are in their nature so inconclusive?" In referring to the instances where equity has reviewed findings of fact, he repeats the doctrine previously established: "Undoubtedly there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed upon by the land office are open to review in the courts. On the contrary, it is fully conceded that when these officers decide controverted questions of fact, in the absence of fraud, or impositions, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when, in the application of the facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief." Chief Justice Marshall had held in Polk's Lessee v. Wendall, 9 Cranch 87 (1815), that when North Carolina had granted certain lands to the United States, reserving the right to complete incipient grants to individuals, the question whether a certain grantee of the State had an incipient title at the time of the cession, went to the title of the grantor and the jurisdiction of the officers passing upon the grant, and remained therefore a question of law for the court. Likewise in Silver v. Ladd, 7 Wall 219, the court reviewed the

interpretation of law by a superior officer in the land department, laid down the correct doctrine and ordered the land conveyed to the one rightfully entitled to it.

The court recognizes the same power of finality in special tribunals to determine facts arising in customs matters. In 1846, in a suit against a collector where the jury appraised the goods at the invoice value and the collector had followed the higher estimate of the appraiser, it was held that the finding of the appraiser governed the case Rankin v. Hoyt, 4 How 327.

The case of Bartlett v. Kane, 16 How 263 (1853), is stronger still, for there, the court denied any review of the appraisement, although it was of the opinion that the method of chemical analysis employed to ascertain the value was not to be relied upon as a safe guide, and was inferior to the plan of fixing the value by ascertaining the cost price in the markets of its production. The court remarked that the appraisers were appointed with power "by all reasonable ways and means" to appraise the value, and that the exercise of the power involved a knowledge, judgment and discretion, and then invoked the general principle "that when power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confined to his or their discretion, the acts so done are binding and valid as to the subject matter." The necessity for the decision was justified in the following language: "The interposition of the courts in the appraisement of importations would involve the collection of the revenue in inextricable confusion and embarrassment."

In Hilton v. Merritt, 110 U. S. 97 (1884), it was held that "in the absence of fraud, the decision of the customs officers is final and conclusive, and their appraise-

ment, in contemplation of law, becomes, for the purpose of calculating and assessing the duties due to the United States, the true dutiable value of the importation." The plaintiff offered evidence showing the true value of the goods and the experience of the appraisers and the care exercised by them in making the appraisal, but the court ruled that it was immaterial, as it did not tend to show that they were assuming powers not conferred by the statute, but merely carelessness or irregularity in the discharge of their duties. The denial of the right to judicial review was sustained on the principle laid down in Murray's Lessee v. Hoboken, etc., Co., and the court observed that "if in every suit brought to recover duties paid under protest, the jury were allowed to review the appraisement made by the customs officers, the result would be great uncertainty and inequality in the collection of duties on imports. It is quite possible that no two juries would agree upon the value of different invoices of the same goods."

The power vested in the customs officials was supported on somewhat different grounds in Buttfield v. Stranahan, 192 U. S. 470 (1904), where the court stated that the plenary power of congress over foreign commerce carried with it absolute power to exclude articles of any particular grade, and that, as no one had a vested right to import, the determination of an administrative board that any specific articles were not up to the standard was in no sense a taking of property, but simply a determination of whether the conditions existed, which conferred the right to import. Under the doctrine of Field v. Clark, 134 U. S. 649 (1891), it was held proper to delegate to the board the power to fix the standard and to apply it, and further, that its exercise was not conditioned upon the

granting of a hearing to the individual whom the determination was to affect. The administration was allowed to enforce its own determination without judicial process, as in the oft-cited case of Murray's Lessee v. Hoboken, etc., Co.

The same principle underlies the series of cases sustaining the power vested in the postmaster general to issue fraud orders barring the mail of concerns whose business he deems to be fraudulent, though they are by the statute denied the right to a judicial review of the facts on which his decision is based. In Public Clearing House v. Coyne, 194 U. S. 497 (1904), the court say that, as the postal service is no necessary part of the civil government, but a public function assumed for the general welfare, congress may annex to its use such conditions as it chooses, classify the recipients of mail matter, and forbid the delivery of letters to such as in its judgment are making use of the mails for the purpose of fraud or deception. As in the case of Buttfield v. Stranahan, the determination whether a specific article or individual is within the class excluded from the privilege by congress, is held properly vested in the administration, though the statute provides no hearing for the person whom the determination is to affect. The case rests also upon governmental necessity: "If the ordinary daily transactions of the departments which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of government. * * * It would practically arrest the executive arm of the government if the heads of departments were required to obtain the sanction of the courts upon the multifarious questions arising in their departments,

before action were taken, in any matter which might involve the temporary disposition of private property. Each executive department has certain public functions and duties, the performances of which is absolutely necessary to the existence of the government, but it may temporarily, at least, operate with seeming harshness upon individuals. But it is wisely indicated that the rights of the public must in those particulars override the rights of individuals, provided there be reserved to them an ultimate recourse to the judiciary."

As we have before noted, this ultimate recourse is always available. The limitations upon the reviewing power of the courts are, and must be, in the last analysis, self-imposed ones—a restraint which may be thrown off whenever the spirit of the Constitution demands it. But the cases establish clearly that the court will still withhold relief when the only grievance is that the individual did not have a judicial hearing upon the facts on which the administration based its action in applying the general law which is the source of its jurisdiction and authority.

But those facts, when found, must be such as to justify the action of the administration. Whether upon a determined state of facts the action taken conforms to the dictates of the statute, remains a question for the courts. School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902). In that case, the postmaster-general, instead of investigating the actual conduct of the complainant's business and holding it fraudulent, based his action in issuing the fraud order, upon the established fact that they offered medical advice founded on the proposition that the mind is largely responsible for physical ailments, and the race possesses the power through proper use of the mind to remedy those ills. The court observed that the

statute never meant the question of fraud to depend upon the opinion of the postmaster-general as to the efficacy of any particular method of healing, and ruled that since the facts found would in no aspect be sufficient to justify his action under the statute and the evidence before him in any view of the facts failed to show a violation of the law, his determination that such violation existed was a pure mistake of law on his part, against which the complainants were entitled to relief.

But the courts will not invariably review the determination of the administration simply because the complainant disputes the correctness of the application of admitted principles of law to a determined state of facts; or rather, the courts will not invariably substitute their application of the law to the facts for the application of the administrative officer. In Bates & Guild Co. v. Payne, 194 U. S. 106 (1904), it is said: "Where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive." The necessity for the rule is again invoked: "The consequence of a different rule would be that the court might be flooded with appeals of this kind to review the decision of the postmaster-general in every individual instance." But the court insists on its power to review such determinations, and must in fact consider the law and the facts if properly raised, though they will substitute their determination for that of the postmaster-general only when clearly of the opinion he was wrong.

The construction of the statute given by the administrative officers has a certain presumption in its favor, but as the court says in Houghton v. Payne, 194 U. S. 88 (1904): "The doctrine does not preclude an inquiry

by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute." In that case, the postmaster-general reversed the ruling of his predecessors as to the classification of certain mail matter, and, though it was strongly urged that the doctrine of contemporaneous construction should be applied, the court ruled that such doctrine as a rule of interpretation was not an absolute one, and held that the subsequent ruling of the department was too clearly the one in conformity to the statute, to justify them in approving of the former classification, notwithstanding the length of time such classification had obtained.

II DETERMINATIONS AFFECTING PERSONAL LIBERTY

The power of congress to regulate commerce includes the bringing in of persons as well as the importation of goods, and so statutes vesting in the administration the final determination of whether an alien seeking admittance is within the class lawfully entitled to enter were sustained from the first. It was even held that in reaching this determination the administration is not required to take testimony. Ekiu v. United States, 142 U. S. 651 (1892). The claim was advanced that if the administration excluded an alien who by some law or treaty was of right entitled to enter, they exceeded their jurisdiction, and that this illegal action, if it resulted in restraint of liberty, presented a judicial question for the decision of the court. The supreme court answered that the view, if sustained, would bring into the courts every case of an alien who based his right to enter on some law or treaty, and reiterated that the question of whether the individ-

ual seeking admission was entitled of right under some law or treaty to enter had been constitutionally committed to named officers of the executive department for final determination. Lem Moon Sing v. United States, 158 U. S. 538 (1895).

No other decision is possible unless the courts are to review every administrative determination of fact. For if the decision of the administration is in fact erroneous and their action is based thereon, the result in the specific case is contrary to that designed by the statute. But the same would be true if the court reviewed the facts and reached an erroneous decision. There must, in the nature of things, be somewhere an authority whose determination of a fact establishes conclusively its existence so far as governmental action based thereon is concerned. From the first, the rule of the court was that this final power could be vested in the administration in those cases where governmental necessity required it and where a different rule would swamp the courts and render difficult or impossible the performance of their regular and more strictly judicial functions. So it was settled that the jurisdiction of the administration over the subject matter of aliens seeking admission gave them in fact power to exclude one whom the law was not designed to exclude.

In a subsequent case, it was argued on behalf of the immigrant, that though the jurisdiction of the administration might extend beyond aliens excluded by law or treaty, to aliens generally, it extended no further. It was insisted that if the question involved was whether the individual seeking admission was in fact an alien, it put in issue the jurisdiction of the administration to act at all, and therefore compelled the court to reëxamine

the facts and itself determine whether the petitioner was within the class with whom the administration was intrusted with power to deal. The court answered that the statute meant to give to the administration jurisdiction to decide the question of citizenship and to make that decision final. It evaded the constitutional question involved and decided simply that, at any rate, the petitioner could not obtain a judicial review until he had exhausted the remedies vested by the statute in the administration itself. United States v. Sing Tuck, 194 U. S. 161 (1904). But soon there appeared a petitioner who had been denied admission by the highest administrative officer, and who based his right to enter on the fact that he was a native of the United States and therefore a citizen, and on the principle of law, that, under the Constitution, congress could not give to the executive department the power to exclude a citizen returning to his native country. The court now took the last ditch. It followed its interpretation of the statute in the Sing Tuck case and declared that the act purports to make the decision of the department final on whatever ground the right to enter the country is claimed, as well when it is citizenship as when it is domicil and the belonging to a class excepted from the exclusion acts. The contention of unconstitutionality was dismissed by the assertion that, though to deny entrance to a citizen is to deprive him of liberty, with regard to him (*i. e.*, with regard to a citizen of Chinese parentage seeking admission at the frontier), due process of law does not require a judicial trial. United States v. Ju Toy, 198 U. S. 253, (1905).

There was a vigorous dissent by Mr. Justice Brewer, and the case has found few to do it reverence. The lower court had granted the petitioner a judicial hearing and

determined that he was in fact a citizen; so the result was, as the dissenting opinion set forth, that one who has been judicially determined to be a free-born American citizen[1] may, by the action of a ministerial officer, be punished by deportation and banishment without trial by jury and without judicial examination. If this means that the court lays down the rule of law, that a citizen may be banished by a ministerial officer, without right of appeal to the courts, it is indeed a remarkable interpretation of the phrase "due process of law." But such is not the law of the case. It decides simply this, and no more:—that whether a Chinese person who seeks admission to this country, was born here or not, may, under certain limitations not yet defined, be determined finally by officers of the administration, even though, on the determination of this fact, depends his citizenship and his right to enter.

It is submitted, that as a rule of law, this decision is absolutely necessary if we are to have an efficient exercise of the power to determine who shall enter this country, and if our courts are to be left free for the business which confessedly belongs to them. The decision of questions seriously affecting private rights must be committed to some fallible tribunal. Due process of law can rightfully demand no more than that the procedure devised for reaching this decision give to the individual every opportunity to establish his rights, consistent with maintaining the orderly and efficient administration of government. The public welfare is entitled to as much consideration as the private right; and the exigencies of

[1] At the hearing in the court below, the government declined to offer evidence as to the nativity of petitioner, insisting upon the power of the administration to determine the fact finally; which robs the judicial determination of citizenship of some of its force so far as the particular case is concerned.

national well-being have been rightfully deemed an important factor in determining whether the final decision of an administrative board is due process of law. The courts have regarded the cases, not as isolated examples of governmental activity, but as instances of many similar ones, and have in all cases been influenced by the effect a contrary rule would have on the work of the judiciary and the attainment of the ends which the legislature and the court deem essential to the public welfare.

These considerations apply with equal force to cases where the right to enter is based on citizenship. Once that matter were open to judicial review, each incoming celestial would allege the fact and raise a cloud of yellow witnesses to prove it. The principle has long been unquestioned that the privilege of judicial determination of facts affecting private rights must yield before public necessity, and that administrative action absolutely essential to national well-being is due process of law within the meaning of the Constitution. The Ju Toy Case does not transcend the boundaries previously established.

The true content of the decision will appear more clearly from a consideration of the arguments urged against it.

Mr. Justice Brewer, in the dissenting opinion, refers to decisions upon administrative determinations in the land department, to show that questions of fact upon which the jurisdiction of the administration rests are never regarded as settled by its rulings. But the cases cited do not decide that the administration may not be vested with final determination of a fact, which, if found one way, gives them jurisdiction and authority to act, and, if found another way, deprives them thereof. They are instances, rather, of the familiar principle, that in apply-

ing rules of law to facts found, and in determining what classes of facts are committed to the administration for decision, their action is subject to judicial review. Though the statute authorizes them to dispose of timber lands and not of swamps, or vice versa, they may decide finally to which class a given parcel belongs. Whether, whatever its nature, their action is within their jurisdiction and justified by the statute, remains a question of law for the court. The nature of the land may be determined by a mere physical examination or a consideration of testimony as to its physical characteristics; but to know whether it is public land or has been set apart for sale, requires a reading of the statute and an interpretation of its provisions to determine their applicability to the land in question. So in the customs matters to which the dissenting opinion turns for support, it is held that the administration may decide finally the value and quality of goods imported (Buttfield v. Stranahan). The court reviews a determination that they are dutiable at a certain rate, because that involves an application of the statute to the facts. Similarly, the place of birth is a fact, the finding of which the court will not review. Whether the proper methods are used in reaching the finding, and whether, conceding the place of birth, the immigrant is an alien and the action of the administration is justified, remain questions of law on which the court will have its say. The very case from which Mr. Justice Brewer quotes (Smelting Co. v. Kemp) in another part of the opinion, puts the distinction clearly. To the general rule as to the presumption in favor of administrative action, it states the exception that if the patent be issued without authority, it may be collaterally impeached in a court of law, and then adds: "This exception is subject to the qualifica-

tion, that when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision."

Mr. Justice Brewer also seeks comfort from cases, holding that when judicial proceedings in one State are asserted as the basis of rights in another, the court may reexamine and contradict the facts necessary to show jurisdiction set forth in the recital of proceedings by the original forum. The analogy is faulty, because no authority with power has ever sought to vest in the first tribunal the final determination of the facts on which its jurisdiction depends. The creature of one sovereign power cannot by its recitals bind the creature of another. When Massachusetts is asked to enforce a right based on judicial proceedings in Pennsylvania, that commonwealth may ascertain for itself whether there were in fact judicial proceedings in Pennsylvania. The constitutional provision does not require it to give full faith and credit to everything another State claims to be a judicial proceeding. In the immigration cases, the legislature is a power which may, if due regard is shown for private rights, determine the jurisdiction both of the administrative board and of the judiciary, and it may say that one department must accept as final the determination by the other of such facts as the legislature commits to it.

If the Ju Toy Case had decided that the administration had no jurisdiction to act save in cases of aliens, but that it could have the last say on the question whether

the individual was an alien, then it would be open to the objections urged against it, that it allowed the administration to determine the very fact on which its jurisdiction was conditioned. But the doctrine of the case is in harmony with the principle that it is for the courts to determine what limits the legislature has placed upon the jurisdiction of the administration, and whether its decision is within the confines of those limits. The court in the Sing Tuck Case had ruled that congress did not mean the jurisdiction of the administration to be conditioned on alienage but meant to consign to it the final determination of the facts on which depended citizenship. The Ju Toy Case was concerned primarily with the constitutionality of the act interpreted in that fashion. It may well be that the language of the statute did not warrant the interpretation which the court put upon it—but that concerns the rhetorician more deeply than the student of administrative law. Whatever the correct interpretation of the words employed, the silence of congress since 1903 is a fair indication that the court caught the meaning the statute was intended to convey.

III JUDICIAL CONTROL OVER ADMINISTRATIVE PROCEDURE

The Ju Toy Case came before the supreme court, not on appeal from the circuit court dismissing the writ, but upon a certificate presenting certain definite questions of law. The court in making answer say: "We assume, as the questions assume, that no abuse of authority of any kind is alleged." The questions assume that nothing more than the fact of the hearing and the finding that he was not born in the United States appears to show that executive officers failed to grant a proper hearing, abused

their discretion or acted in any unlawful or improper way upon the case presented to them for determination. They ask whether the court shall treat the finding of fact by the executive officer as final and conclusive "unless it be made affirmatively to appear that such officers in the case submitted to them, abused the discretion vested in them, or in some other way, in hearing and determining the same committed prejudicial errors." So, though it is held that the administration may be vested with the power of final decision, it is by no means set forth that in reaching that determination it is subject to no judicial restraints. The case explicitly leaves open the question what the decision would be if the petitioner alleged that the board abused their discretion or in some other way committed prejudicial error.

We must, therefore, ascertain the restrictions imposed upon the administration as to the methods it must pursue in arriving at its determination, and the limits of the fields in which such power may be exercised, by a consideration of other cases. It is clear that when the prayer is for a writ of *certiorari* in addition to one of *habeas corpus* the court will examine the evidence and the findings of the board. Where no question is raised as to the methods adopted in securing evidence and reaching a determination, the decision of the facts by the administration will not be overturned, except where the court holds as a matter of law there was no evidence on which the conclusion could be rested. Turner v. Williams, 194 U. S. 279 (1904). So, while the court will not judge of the truth or falsity of the evidence, it denies to the administration the final determination of its sufficiency as legal proof.

It is difficult to formulate precise rules as to the re-

quired administrative procedure, for in the decided cases, the methods pursued have been held due process. In a dictum in Yamataya v. Fisher, 189 U. S. 86 (1902) Mr. Justice Harlan says that the court "must not be understood as holding that administrative officers, when executing a statute involving the liberty of persons may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." One of these principles he declares to be the right to a hearing of some kind in respect to the matters upon which that liberty depends. We saw, however, that in determinations affecting property, a statute was not unconstitutional for failure to make provision for a hearing (Clearing House v. Coyne); nor did the absence of a hearing render unconstitutional, administrative action where the determination was reached by a comparison of a specific article with an established standard (Buttfield v. Stranahan); and further, that in hearings upon questions where personal liberty is involved, the taking of evidence is not indispensable (Ekiu v. U. S.). But it does not appear that a hearing was denied in the Coyne Case, nor that evidence was offered before the inspector in behalf of Miss Ekiu. So we may infer from the language of Mr. Justice Harlan in the Yamataya Case, that the doctrine of the court is, that in matters affecting personal liberty, at any rate, the individual must be granted an opportunity to be heard on the questions in issue. In reaching its determination, however, the board acts not as a court, but as an instrument of the executive power, and is not restricted by the doctrine of *res adjudicata*. It may, when authorized by statute, reëxamine the facts at a subsequent hearing involving the same questions between the same parties, and reverse its former

decision. Pearson v. Williams, 202 U. S. 281 (1906). But the Yamataya Case suggests that the same restrictions govern its procedure at a rehearing as before.

Mr. Justice Brewer deemed the administrative action in the case of Ju Toy inconsistent with the requirements of due process, because of the severity of its procedure. But that question was not before the court. The sole ground on which the petitioner sought release was that he was a citizen and that therefore his right to enter could not be committed to the executive department for determination. Whether it may under the Constitution be committed to the administration at all, and whether the statute purporting to vest the power fails to provide sufficient guaranties for the protection of the personal rights involved, are two distinct questions—the first only of which was raised in the case. It is to be noted that the court in the Sing Tuck Case differs from Justice Brewer in their view of the procedure established for the administrative hearing. They consider that in case of appeal from the inspector to the secretary, new evidence, briefs, etc., may be submitted, and that the whole scheme is intended to give as fair a chance to prove a right to enter the country as the necessarily summary character of the proceedings will admit. So that if a petitioner should present the issue that such fair chance is in fact denied, the court may examine the matter and agree with Mr. Justice Brewer that the procedure is not due process.

Finally, if the question of alienage depends upon a matter of law, the question is always one for the court, and judicial relief will be granted although recourse is not first had to the administrative remedies offered. Gonzales v. Williams, 192 U. S. 1 (1904).

IV THE OBJECTS FOR WHICH THE POWER MAY BE CONFERRED

Approaching the whole question from the standpoint of a petitioner judicially determined to be a citizen, the Ju Toy decision at first blush is monstrous. But starting with the presence of a horde of immigrants on the frontier, whom the proper authority in the government has determined we must exclude, if our national ideals are to be preserved, the case has more to justify it. The demands of public necessity collide with the possible infringement of private right, and, rightly or wrongly, it has been determined to be law in the United States that the exigencies of the national welfare are to have the right of way.

It is the doctrine of the supreme court that such exigency alone justifies the exercise of this power. It has been sustained in matters which relate to those departments of the government established for promoting public welfare in ways to which the citizen has no vested right, matters requiring uniformity of decision if there is to be equality between different individuals affected, and matters where prompt action is essential if the necessary end is to be attained. Congress has not been prone to bestow such power in other instances, so we have few judicial decisions describing the boundaries of the field where it may have play. In the case of immigration, however, the court has held that the necessity which justifies the administrative power does not extend beyond the prevention of residence here of the undesirable classes. Though congress may provide summary means for keeping the objectionable individual out of the country, it cannot employ those methods to punish the intruder for seeking to enter or for sojourning without right. Wong

Wing v. United States, 163 U. S. 228 (1896).[2] Another limitation has been laid down recently in a decision by Judge Grosscup in the circuit court of appeals, seventh circuit, which holds that congress may not by a change of the rules of evidence deprive a *resident* Chinaman, who claims to be a citizen, of a fair judicial trial according to recognized procedure upon the facts on which his right to remain depends. The opinion states: "While it is true, now that the supreme court has so decided, that the political power of the government may say whether a citizen of the country who has gone away shall be allowed to return or not, it seems to us incontrovertible that a citizen of the country who has not gone out, may not be deported or banished until the right of the government to deport or banish has been judicially determined." Moy Suey v. United States, 33 Nat. Corp Rep. 40 (April, 1906). This limit is one which the supreme court may consistently follow; for the judicial determination of the question of citizenship of Chinamen already resident here will have none of the serious consequences that would attend the vesting of similar rights in Chinamen seeking admittance.

It may be that many of the decisions here reviewed were not contemplated as possible by the framers of the Constitution, who placed the protection of private rights in the arm of the judiciary. But there was as little anticipation of the external conditions on which those decisions are based. They chose to leave the definition of "due process of law" to the judiciary, and if we find that in

[2] Since temporary confinement is a less serious interference with private right than permanent exclusion, the case shows clearly that the determining factor in sustaining the exercise of these administration functions is not the extent of the restraint of personal liberty, but the relation of the means employed to the necessities of government.

reaching that definition, the well-being of the people as a whole is regarded as worthy of as much consideration as the well-being of a single individual, we are not for that reason to assert that we are departing from the spirit of the Fathers and vesting in the government absolute and arbitrary powers characteristic of despotism rather than democracy.